Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

JANELLE SUSAN SPAIN, an individual, and JENNA MARGARET SPAIN, a minor, by and through her Guardian ad Litem, JANELLE SPAIN,

Plaintiffs-Petitioners,

vs.

AETNA LIFE INSURANCE COMPANY,

Defendant-Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Is an action brought by the surviving wife and child of a beneficiary under an ERISA plan and brought against, not the ERISA plan but the administrator of the ERISA plan, seeking damages only for wrongful death, subject to pre-emption by ERISA?

PARTIES TO THE PROCEEDING

Plaintiffs-Petitioners:

JANELLE SUSAN SPAIN, an individual, and JENNA MARGARET SPAIN, a minor, by and through her Guardian ad Litem, JANELLE SPAIN,

Defendant-Respondent:

AETNA LIFE INSURANCE COMPANY

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REFERENCE TO REPORT OF OPINION

The official report of the opinion delivered by the Ninth Circuit Court of Appeal in this action is:

Spain v. Aetna Life Ins. Co.,
11 F.3d 129 (1993)

GROUNDS FOR JURISDICTION

The judgment to be reviewed in this action was entered by the Ninth Circuit Court of Appeals on December 6, 1993. (The opinion is included in the Appendix at Tab A. The underlying order of the District Court is included in the Appendix at Tab B.)

No order respecting a rehearing or granting an extension of time within which to file the petition for a writ of certiorari has been made.

No reliance on Rule 12.3 is made.

This honorable Court has jurisdiction to review the judgment by writ of certiorari under 28 U.S.C. section 1254.

The Ninth Circuit Court of Appeals in this action determined that this

action arises under 29 U.S.C. section 1001, et seq., the Employee Retirement Income Security Act ("ERISA").

RELEVANT STATUTES

The statutes relevant to this action are 29 U.S.C section 1001, 29 U.S.C. section 1132, and 29 U.S.C. section 1144. The relevant ERISA statutes are included within the Appendix at Tab C.

STATEMENT OF THE CASE

A man died. He died because the administrator of his medical plan refused to authorize payment for the treatment that would have saved his

life. He died even though the treatment he needed was covered under the medical plan. The Ninth Circuit Court of Appeals has ruled that his wife and daughter cannot recover damages from the administrator of medical plan for the loss of their husband and father. The Ninth Circuit has ruled that their damages must go uncompensated.

The appellate court's determination was not based on an examination of the facts. The appellate court did not even get to the issue of causation. The appellate court ruled, as a matter of law, that this action was pre-empted by the Employee Retirement Income Security Act, 29 U.S.C. section 1001, et seq. That legislation, however, provides no remedy to a parent, spouse or child who has lost a loved one through the

negligence of an administrator of a medical plan.

Summary of Facts

This is a wrongful death action brought by the surviving wife and daughter of Steven Spain ("Steven"). Steven suffered from testicular germ cell cancer and required an autologous bone marrow transplant ("ABMT") as his only hope for cure. The ABMT procedure was covered under the group medical benefit plan provided by the employer of Steven's wife, plaintiff and petitioner JANELLE SPAIN. That plan was administered by defendant AETNA LIFE INSURANCE COMPANY ("AETNA"). AETNA approved two steps in the ABMT procedure but refused to authorize the third, crucial step in the procedure on the

grounds that the procedure was investigational or experimental for treatment of Steven's illness.

Only after Steven retained counsel and filed an action did AETNA belatedly agree to approve the provision of benefits. By that time, however, it was too late for Steven. Unfortunately, ABMT procedures can be performed successfully only during a very narrow window of time and by the time AETNA acknowledged its error and approved the procedure, Steven's window had closed. Although he finally finished the procedure, he subsequently died of his illness.

This wrongful death action is brought against AETNA for its negligent and wrongful delay in providing approval for payment of the covered benefits

under the medical plan administered by it. Petitioners allege that AETNA's delay proximately resulted in Steven's premature death.

This action was originally filed in the Superior Court of the State of California, County of Los Angeles. AETNA removed this action to the United States District Court, Central District of California on both the grounds that federal question and diversity jurisdiction existed.

ARGUMENT

Review of the decision of the Ninth Circuit Court of Appeals is sought under Supreme Court Rule 10.1 on the grounds that there are special and important reasons therefore and under Rule 10.1(c) on the grounds that the Ninth Circuit Court of Appeals has decided an important question of federal law which has not been, but which should be, settled by this Court.

A.

THE PRE-EMPTION OF A WRONGFUL DEATH ACTION WHICH IS BROUGHT BY ONE WHO IS NOT A PARTICIPANT OF AN ERISA PLAN, BROUGHT AGAINST ONE WHO IS NOT AN ERISA FIDUCIARY AND WHICH DOES NOT SEEK RECOVERY OF PLAN BENEFITS RAISES CRITICALLY IMPORTANT QUESTIONS REGARDING THE INTENT AND PURPOSE OF ERISA WHICH MUST BE ADDRESSED BY THIS COURT

1. Permitting pre-emption of a wrongful death action in the context of the facts presented here subverts the expressed and accepted purposes of ERISA and grants an unwarranted immunity unparalleled in the law without advancing the purposes of the pre-emption provisions.

As was explained by this Court in its decision in Massachusetts v. Morash, 490 U.S. 107, 109 S.Ct. 1668, 104 L.Ed.2d 98 (1989):

> "In enacting ERISA, Congress' primary concern was with the mismanagement of funds accumulated to finance employee benefits and the failure to pay employees benefits from the accumulated funds. [Citation.] To that end, it has established extensive reporting, disclosure, and fiduciary duty requirements to insure against the possibility that the employee's expectation of the benefit would be defeated through poor management by the

plan administrator."

As this Court further noted, Congress's express intention in enacting ERISA was "to promote the interests of employees and their beneficiaries in employee benefit plans,. . . and to protect contractually defined benefits." Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 109 S.Ct. 948, 955, 103 L.Ed.2d 80 (1989).

It is clear that ERISA properly applies to an action for recovery of plan benefits. However, once the factual scenarios deviate from that simple bright-line test, the issue becomes more complex and involved. This case presents a legal question as to the issue of whether pre-emption should be allowed where pre-emption would not

advance, but would actually subvert, ERISA's purposes.

In contrast to ERISA's overall purpose, ERISA's pre-emption provisions, 29 U.S.C. 1144, were designed to afford "employers the advantages of a uniform set of regulations governing plan fiduciary responsibilities and governing procedures for processing claims and paying benefits." Memorial Hospital System v. Northbrook Life Insurance Company, 904 F.2d 236, 245-246 (1990), citing Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 9-11, 107 S.Ct. 2211, 2216-2217, 96 L.Ed.2d 1 (1987).

The circuit courts have struggled with the tension created by the conflict between fulfilling ERISA's overall purpose and protecting the interests served by the pre-emption clause. In

this case, the Ninth Circuit Court of Appeals resolved that conflict in favor of pre-emption.

That determination, however, actually subverts, and nearly destroys, ERISA's overall purpose while failing to advance the objective of the pre-emption clause. Conversely, a finding that pre-emption does not apply in this context would materially advance ERISA's overall purpose while having no adverse impact on the regulatory or administrative functions involved.

a. Granting the unprecedented immunity of ERISA pre-emption in a wrongful death case subverts and defeats ERISA's overall purposes.

Application of a pre-emption rule as employed by the Ninth Circuit in this

case would allow plan administrators and insurers who issue medical insurance policies to ERISA plans to escape liability for actions based on claims for wrongful death. As a result of that immunity, it would be sound business practice for an insurer or plan administrator to delay payment of benefits, to wrongfully deny benefits and to engage in other deleterious tactics in order to decrease its financial obligations. Like the criminal who fears no reprisal from the State for his or her tortious or criminal acts, pre-emption of a wrongful death action assures that there is similarly no "downside" or disincentive to prevent an insurer or plan administrator from committing tortious, and even fatal, acts. This creates a

system of law that actually encourages abuse.

For example, if the only damages recoverable under ERISA are the contractual benefits denied by the plan through its insurer or its administrator, and even those damages can be avoided by simply waiting until the insured dies, it serves the insurer's or administrator's interest to contest the rights of the insured, deny coverage and force the insured to curtail medical treatments, even when the benefits are unambiguously provided under the medical plan. In cases of catastrophic illness, it even behooves the insurer or administrator to deny life-saving treatments so that the plan participant will die and relieve the insurer or administrator of any further

obligation to provide continuing benefits. If the plan participant cannot pay for the treatment himself or herself, then *no* damages are incurred at all because no plan benefits are payable and the insurer escapes "scot-free."

Thus, pre-emption of wrongful death actions, for which there is no remedy under ERISA, actually provides an ***incentive*** to an insurer or a plan administrator to ***wrongfully*** deny plan benefits where the benefit sought is a life-saving treatment. This, of course, completely subverts ERISA's overall purpose of "protect[ing] contractually defined benefits." Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 109 S.Ct. 948, 955, 103 L.Ed.2d 80 (1989).

b. Refusing to permit pre-emption in such a case does not defeat the pre-emption clause's purpose in providing uniform regulations for ERISA plans.

Conversely, imposition of liability on in this context does not implicate Congress's concerns in seeking to establish a regulatory framework for protection of ERISA fiduciaries. Indeed, the damages to be paid in this action are not assessed against the plan. They are assessed only against the administrator. Similarly, assessment of damages against the administrator does not affect the ongoing administration of the plan because the liability is based on the administrator's own, independent liability for its own, independent

conduct in a distinct, circumstance.

As the court in Memorial Hospital, 904 F.2d at 250 noted:

> "This conclusion [that the preemptive scope of ERISA is neither all-encompassing nor unlimited] follows as a matter of common sense from the fact that ERISA plan members and managers are bound to engage in myriad transactions that Congress never considered when it drafted section 514. A preemption provision designed to prevent state interference with federal control of ERISA plans does not require the creation of a fully insulated legal world that excludes these plans from regulation of

any purely local transaction."

Thus, refusing to pre-empt wrongful death actions such as this one would not force ERISA plans, their administrators or their insurers to adjust to local regulations and would not disturb the uniform regulatory system applying to the administration of the plan.

As noted by the court in Memorial Hospital System v. Northbrook Life Insurance Company, 904 F.2d at 246, the uniform regulatory purpose of ERISA is not implicated where the recovery under the action at issue in no way expands the rights of the plan participant to receive benefits under the terms of the plan.

A wrongful death action cannot, by definition, *expand* the benefits

otherwise owed. Rather, it seeks damages for the death resulting from the failure to pay benefits that were, in fact, ***already*** owed. No new regulatory or administrative requirements are imposed. Thus, imposition of liability for wrongful death does not subject administrators to conflicting laws. Rather, the administrator or insurer is protected from potential liability by doing what it is already required and obligated to do.

2. The "gap in remedies" caused by pre-emption of wrongful death cases is properly addressed by this Court in establishing the proper parameters to be applied in effectuating the pre-emption provisions.

In finding that the wrongful death action alleged in this case was pre-empted by ERISA, the Ninth Circuit quoted the Fifth Circuit's decision in Corcoran v. United Healthcare, Inc., 965 F.2d 1321, 1332 (5th Cir. 1992), cert. den., ___ U.S. ___, 113 S.Ct. 812, 121 L.Ed.2d 684 (1992) for the proposition that the "gap in remedies" caused by the pre-emption of wrongful death claims is an issue which must be addressed by Congress. That, however, is simply a failure by those courts to properly analyze and apply the decisions of this

Court in regard to the appropriate application of the pre-emption provisions.

In examining the breadth of the pre-emption clause, the court in Memorial Hospital, supra, 904 F.2d at 244 noted that while this Court has held that the pre-emption clause is to be liberally interpreted, "[a] purely semantic approach cannot be taken to its logical extreme, however." Similarly, the same court noted in Sommers Drug Stores Co. v. Corrigan Enterprises, Inc., 793 F.2d 1456, 1465 (5th Cir. 1986) that "the Supreme Court has indicated that it will not extend the 'relate to' language to its outer limit."

Thus, given the factors which have been developed by this Court and the

appellate courts in determining the scope and application of the "relates to" language of the pre-emption provisions, it is well within this Court's power and interest to apply those parameters to the wrongful death issue and, to properly conclude that a wrongful death action in the context of the facts presented, affects the plan in "too tenuous, remote or peripheral a manner to warrant a finding that the law 'relates to' the plan." Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 100 n. 21, 103 S.Ct. 2890, 2901, n. 21, 77 L.Ed.2d 490 (1983).

In a wrongful death action such as that presented here, the effect on the plan is "too tenuous, remote or peripheral" to justify pre-emption for several reasons. First, the parties to

the action are not the ERISA principals. Numerous appellate courts have concluded that where the state law cause of action at issue does not involve the principal parties to the ERISA transaction, pre-emption is not warranted. Memorial Hospital, supra, 904 F.2d at 249-250; Sommers Drug, supra, 793 F.2d at 1467-1468; Perkins v. Time Insurance Co., 898 F.2d 470, 473-474 (5th Cir. 1990). In Perkins v. Time Ins. Co., 898 F.2d 470, 473, (5th Cir. 1990) the court noted that:

> "A state law claim ... which does not affect the relations among the principal ERISA entities (the employer, the plan fiduciaries, the plan, and the beneficiaries) as such, is not preempted by

ERISA."

This is just such a state law claim. This action does not affect the relations among the employer, the plan or the plan beneficiaries since none of those entities are parties to this action. As noted by the court in Memorial Hospital:

> "In Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan Enterprises, Inc., 793 F.2d 1456, 1467-68 (5th Cir.1986), cert. denied, 479 U.S. 1034, 107 S.Ct. 884, 93 L.Ed.2d 837 (1987), we determined that the most important factor for a court to consider in deciding whether a state law that

affects an employee benefit plan 'is too tenuous, remote, or peripheral a manner to be preempted' is whether the state law affects relations among ERISA's named entities. '[C]ourts are more likely to find that a state law relates to a benefit plan if it affects relations among the principal ERISA entities--the employer, the plan, the plan fiduciaries, and the beneficiaries-- than if it affects relations between one of these entities and an outside party, or between two outside parties with only an incidental effect on the plan.'" (Memorial Hospital,

supra, 904 F.2d at 249.)

Because the appellants are not suing as plan beneficiaries or participants, they are non-ERISA outside parties and California's state law permitting wrongful death damages is therefore "too tenuous, remote or peripheral" to support ERISA pre-emption.

Second, the liability sought to be imposed in this case is not derivative of the ERISA plan and does not "relate to" the ERISA plan in the sense that term is used in the pre-emption context. AETNA owed its own primary, independent duty of care to the petitioners, separate and apart from its duty under the Plan to actually authorize payment of the benefits. (California Code of

Civil Procedure section 377.60; Witkin, Cal.Summary, 9th Ed., Torts, Vol. 6, section 1197 [California's wrongful death statute creates new cause of action based on heirs' own independent pecuniary injury suffered as the result of the loss of a relative].) AETNA breached that duty of care and caused the death of Steven Spain. AETNA should properly be subjected to liability for its breach of that duty of care. As this Court held in Mackey v. Lanier Collection Agency & Service, Inc., 486 U.S. 825, 108 S.Ct. 2182, 100 L.Ed.2d 836 (1988), ERISA plans may properly be sued in "run of the mill" tort cases.

Third, pre-emption is not appropriate because pre-emption would strip the survivors of any ability to obtain damages for the wrong. In

determining whether an employees' action to rescind a promised benefit plan was subject to ERISA pre-emption, the court in Perry v. P*I*E* Nationwide, Inc., 872 F.2d 157 (6th Cir. 1989) examined and followed the analysis set forth in Dependahl v. Falstaff Brewing Corp., 653 F.2d 1208 (8th Cir. 1981), cert. denied, 454 U.S. 968, 102 S.Ct. 512, 70 L.Ed.2d 384:

> "Dependahl held that preemption of state common law claims, such as tortious interference, applies when (1) Congress has indicated an intent to "occupy the field," and (2) ***Congress has provided a remedy for the alleged wrong.*** 653 F.2d at 1215. See, to this same effect, Ogden v.

Michigan Bell Telephone Co., 571 F.Supp. 520, 523 (E.D.Mich. 1983). Resolution of the second of these Dependahl standards depends upon an interpretation of 29 U.S.C. section 1132, the ERISA civil enforcement provision. Section 1132(a)(3) provides that a civil action may be brought by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions

> of this subchapter or the terms of the plan. . . . We are disposed, however, toward the reasoning of Dependahl v. Falstaff Brewing Corp., 653 F.2d 1208 (8th Cir.), cert. denied, 454 U.S. 968, 102 S.Ct. 512, 70 L.Ed.2d 384 (1981), that ***preemption should apply to a state law claim only if Congress has provided a remedy for the wrong or wrongs asserted.***" (Emphases added.)

This Court can properly address and apply those principles to the pre-emption issue presented by this case and can, and should, establish - clearly and unequivocally - that the wrongful death

of a person will not be allowed to fall through the "gap in remedies" cause by the improper application of the pre-emption provisions of ERISA.

CONCLUSION

This case makes it heart-rendingly clear that Congress's expressed intent to protect a beneficiary's interest in the benefit plan and the protection of the beneficiary's contractually defined benefits cannot be fulfilled where a plan administrator can wrongfully deny benefits, thereby causing the beneficiary's death, yet escape all liability for that wrongful conduct. At some point, the "careful balance" in the "bargain" struck by Congress between protecting the beneficiary's interests and providing the plan with a

comprehensive and consistent regulatory framework within which to work (see Memorial Hospital System v. Northbrook Life Ins. Co., 904 F.2d at 249) must tip in favor of protecting the right of the beneficiary to live and the right of the beneficiary's nearest and dearest to enjoy the care, comfort and society of their loved one including, ultimately, the right to recover damages for the wrongful death of that loved one caused by the tortious conduct of the plan administrator. Where the protection of the plan's or the administrator's "regulatory function" overcomes the maintenance of the beneficiary's life, ERISA has been warped and skewed far beyond its original express intent and purpose. Balance must be restored.

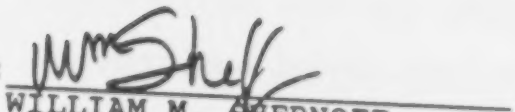
These issues must now be addressed

by this Court and it is respectfully requested that the petition be granted and this matter be reviewed.

Dated this 4th day of March, 1994 at Claremont, California.

Respectfully submitted,

SHERNOFF, BIDART & DARRAS

By: 

WILLIAM M. SHERNOFF
Attorneys for Plaintiffs-Petitioners

APPENDIX

APPENDIX

TAB	DOCUMENT
A	Opinion of the Ninth Circuit Court of Appeals entered on December 6, 1993, officially cited as Spain v. Aetna Life Ins. Co., 11 F.3d 129 (1993).
B	Minute Order of the United States District Court granting Motion to Dismiss, dated January 21, 1993.
C	Relevant Statues, including 29 U.S.C section 1001, 29 U.S.C. section 1132, and 29 U.S.C. section 1144

APPENDIX A

Janelle Susan SPAIN, an individual, and Jenna Margaret Spain, a minor, by and through her Guardian ad Litem, Janelle Spain, Plaintiffs-Appellants,

v.

AETNA LIFE INSURANCE COMPANY, Defendant-Appellee.

No. 93-55303.

United States Court of Appeals,

Ninth Circuit.

Argued and Submitted Oct. 7, 1993.

Decided Dec. 6, 1993.

Sharon J. Arkin, Shernoff, Bidart & Darras, Claremont, CA, for plaintiffs-appellants.

Bless Stritar Young, Fulbright & Jaworski, Los Angeles, CA, for defendant- appellee.

Appeal from the United States District Court for the Central District of California.

Before: FLETCHER, and D.W. NELSON, Circuit Judges; WILL [FN*], District Judge.

FN* The Honorable Hubert L. Will, Senior United States District Judge for the Northern District of Illinois, sitting by designation.

PER CURIAM:

OVERVIEW

A mother and daughter appeal the district court's dismissal of their wrongful death suit against Aetna Life Insurance Company ("Aetna"), the administrator of their

husband's/father's employee benefit plan. They contend the district court erred by deciding that a state common law wrongful death action is preempted by the Employee Retirement Income Security Act ("ERISA") s 514(a), 29 U.S.C. s 1144(a). We do not agree and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

This suit is brought by Janelle and Margaret Spain (the "Spains"), Steven Spain's wife and daughter, respectively. Steven Spain was a plan participant and beneficiary in a self-funded employee benefit plan within the meaning of ERISA. See 29 U.S.C. s 1002(1) (1988). His plan was administered by Aetna.

Steven Spain was diagnosed as having testicular cancer. His doctors decided that an autologous bone marrow

transplant ("ABMT") was necessary to attempt to save his life. Aetna pre-approved the first two parts of this three-part procedure. Initially, Aetna also authorized the last part of the procedure. However, Aetna later withdrew its authorization on the grounds that Steven Spain's diagnosed condition did not make him eligible for this procedure. Because Spain could not afford the final part of the procedure on his own, he brought suit against his employee benefit plan and its administrator, Aetna, to compel authorization of treatment. Two days after notification of the suit, the plan and Aetna authorized the last part of the procedure.

Appellants contend that "ABMT procedures can be performed successfully

only during a very narrow window of time and by the time Aetna acknowledged its error and approved the procedure, Steven's window had closed." Thus, although the procedure was eventually completed, Appellants argue that Steven Spain's death was negligently caused by Aetna's initial denial in authorizing the procedure. At trial, the district court dismissed the case on the grounds that ERISA preempts Appellants' state law claim for wrongful death. This court has jurisdiction under 28 U.S.C. s 1291.

ANALYSIS

"The interpretation of ERISA, a federal statute, is a question of law subject to de novo review." Long v. Flying Tiger Line, Inc., 994 F.2d 692, 694 (9th Cir.1993). Specifically,

"ERISA preemption is a conclusion of law reviewed de novo." Greany v. Western Farm Bureau Life Ins. Co., 973 F.2d 812, 816 (9th Cir.1992) (quoting Olson v. General Dynamics Corp., 951 F.2d 1123, 1125 (9th Cir.1991) (citations omitted)).

The sole issue on review is whether ERISA preempts the state common law wrongful death action. ERISA's preemption clause is "deliberately expansive," Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 45-46, 107 S.Ct. 1549, 1551-52, 95 L.Ed.2d 39 (1987), and " 'contains one of the broadest preemption clauses ever enacted by Congress.' " Greany, 973 F.2d at 817 (citations omitted). The preemption clause states that the provisions provided by ERISA "shall supersede any

and all State laws insofar as they may now or hereafter relate to any employee benefit plan...." 29 U.S.C. s 1144(a). Interpreting ERISA's preemption clause, the Supreme Court has instructed that "relates to" is to be "given its broad common-sense meaning." Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 739, 105 S.Ct. 2380, 2389, 85 L.Ed.2d 728 (1985). Therefore, a state cause of action relates to an ERISA benefit plan if operation of the law impinges on the functioning of an ERISA plan. Id.

Appellants assert that Aetna's improper withdrawal of authorization for Steven Spain's ABMT procedure caused Steven Spain's death. Although Appellants do not seek benefits under the plan, their state common law cause

of action seeks damages for the negligent administration of benefit claims. This circuit, following the lead of the Supreme Court in Pilot Life Ins. Co. v. Dedeaux, has held that "state common law causes of action arising from the improper processing of a claim are preempted by federal law." Kanne v. Connecticut General Life Ins. Co., 867 F.2d 489, 493 (9th Cir.1988), cert. denied, 492 U.S. 906, 109 S.Ct. 3216, 106 L.Ed.2d 566 (1989). Hence, ERISA preempts Appellants' wrongful death action because the state law in its application directly "relates to" the administration and disbursement of ERISA plan benefits. Both the Fifth Circuit and Tenth Circuit, the only two circuits that have confronted the issue of whether ERISA preempts a state

wrongful death action, have reached the same conclusion. See Settles v. Golden Rule Ins. Co., 927 F.2d 505, 510 (10th Cir.1991) ("Because the facts asserted in support of plaintiff's state law claims, including her wrongful death claim, directly relate to an employee benefit plan covered by ERISA, plaintiff's state law claims are preempted by s 514(a) [29 U.S.C. s 1441(a)] of ERISA."); Corcoran v. United Healthcare, Inc., 965 F.2d 1321, 1332 (5th Cir.), cert. denied, --- U.S. ----, 113 S.Ct. 812, 121 L.Ed.2d 684 (1992) ("The principle ... that ERISA pre-empts state-law claims alleging improper handling of benefit claims is broad enough to cover the [wrongful death] action asserted here.").

Further, a state wrongful death

action is not "saved" by the sole exception to ERISA's preemption rule. Although the ERISA preemption clause is broad, Congress created an exception for "any law of any State which regulates insurance, banking, or securities." 29 U.S.C. s 1144(b)(2)(A). Under this exception, a law must not just have an impact on an insurance company, "but must be specifically directed toward that industry." Pilot, 481 U.S. at 50, 107 S.Ct. at 1554. The cause of action for wrongful death at issue in this appeal is a general tort and clearly was not specifically tailored by the state to regulate insurance, banking, or securities.

Congress carefully constructed the civil enforcement provisions allowed under ERISA. Id. at 54, 107 S.Ct. at

1556, 29 U.S.C. s 1132(a). As the Court instructed, "[t]he policy choices reflected in the inclusion of certain remedies and the exclusion of others under the federal scheme would be completely undermined if ERISA-plan participants and beneficiaries were free to obtain remedies under state law that Congress rejected in ERISA." Pilot, 481 U.S. at 54, 107 S.Ct. at 1556. As the Fifth Circuit stated: While we are not unmindful of the fact that our interpretation of the pre- emption clause leaves a gap in remedies within a statute intended to protect participants in employee benefit plans, see Shaw [v. Delta Air Lines, 463 U.S. 85, 90, 103 S.Ct. 2890, 2896, 77 L.Ed.2d 490 (1983)]; Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 113, 109 S.Ct. 948,

103 L.Ed.2d 80 (1989), the lack of an ERISA remedy does not affect a pre-emption analysis. **Corcoran, 965 F.2d at 1333.**

CONCLUSION

Because ERISA preempts the state common law wrongful death action and is not "saved" under the exception to ERISA's broad preemption, we affirm the judgment.

AFFIRMED.

APPENDIX B

Civil Minutes - General

Case No. CV 92-6998-HLH

Date: January 11, 1993

Title: Janelle Susan Spain, et al. v. Aetna Life Ins. Co.

Present: Hon. Harry L. Hupp, Judge
Millie Borgarding, Deputy Clerk

Attorneys Present for Plaintiffs: Sharon Arkin

Attorneys Present for Defendants: Bless Stritar Young, Perry Cameron

Dismiss

ORDER:

The motion to dismiss is granted.

The First Amended Complaint (FAC) alleges claims which are preempted by ERISA. (Pilot Life '87 481 US 95, 95 LEd2d 39; Settles 10 Cir'91 927 F2d 505; Corcoran 5Cir'92 965 F2d 1321; Holmes CDCal'89 706 F.Supp. 733.) While there are areas of litigation against ERISA plans which are outside of ERISA preemption (e.g. Mackey '88 486 US 825, 100 LEd2d 836), a case which deals directly with the construction or administration of an ERISA plan is so much related to the plan that it must be considered preempted.

Here, the main thrust of the lawsuit is that a denial in authorizing

a continuation of medical treatment in progress negligently caused the death of an ERISA beneficiary. This has to do directly with the administration of an ERISA plan, and is therefore "related" to the plan within the meaning of Pilot Life preemption.

Plaintiff gives the example of a case where there would not be preemption--the plan's automobile negligently runs over the beneficiary and kills him. The difference is that the hypothetical case does not involve the granting or withholding of benefits.

There are cases (this court has had a few) which are on the borderline and hard to call, but this is not one of them.

Governing fact is whether administration of plans is involved. If

so, there is preemption. Warren Hosp (5th Cir) where line is drawn

Motion to dismiss granted. Plaintiff acknowledges she cannot improve pleadings to circumvent preemption.

Dismissal is w/o leave to amend.

Dismissal by separate order signed and filed today 1-11-93.

APPENDIX C

UNITED STATES CODE ANNOTATED

TITLE 29. LABOR

CHAPTER 18--EMPLOYEE RETIREMENT INCOME SECURITY PROGRAM

SUBCHAPTER I--PROTECTION OF EMPLOYEE BENEFIT RIGHTS

SUBTITLE A--GENERAL PROVISIONS

Current through P.L. 103-210, approved 12-20-93

§ 1001. Congressional findings and declaration of policy

(a) Benefit plans as affecting interstate commerce and the Federal taxing power

The Congress finds that the growth in size, scope, and numbers of employee

benefit plans in recent years has been rapid and substantial; that the operational scope and economic impact of such plans is increasingly interstate; that the continued well-being and security of millions of employees and their dependents are directly affected by these plans; that they are affected with a national public interest; that they have become an important factor affecting the stability of employment and the successful development of industrial relations; that they have become an important factor in commerce because of the interstate character of their activities, and of the activities of their participants, and the employers, employee organizations, and other entities by which they are established or maintained; that a large

volume of the activities of such plans is carried on by means of the mails and instrumentalities of interstate commerce; that owing to the lack of employee information and adequate safeguards concerning their operation, it is desirable in the interests of employees and their beneficiaries, and to provide for the general welfare and the free flow of commerce, that disclosure be made and safeguards be provided with respect to the establishment, operation, and administration of such plans; that they substantially affect the revenues of the United States because they are afforded preferential Federal tax treatment; that despite the enormous growth in such plans many employees with long years of employment are losing anticipated

retirement benefits owing to the lack of vesting provisions in such plans; that owing to the inadequacy of current minimum standards, the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered; that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits; and that it is therefore desirable in the interests of employees and their beneficiaries, for the protection of the revenue of the United States, and to provide for the free flow of commerce, that minimum standards be provided assuring the equitable character of such plans and their financial soundness.

(b) Protection of interstate commerce and beneficiaries by requiring disclosure and reporting, setting standards of conduct, etc., for fiduciaries

It is hereby declared to be the policy of this chapter to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

(c) Protection of interstate commerce, the Federal taxing power, and beneficiaries by vesting of accrued benefits, setting minimum standards of funding, requiring termination insurance

It is hereby further declared to be the policy of this chapter to protect interstate commerce, the Federal taxing power, and the interests of participants in private pension plans and their beneficiaries by improving the equitable character and the soundness of such plans by requiring them to vest the accrued benefits of employees with significant periods of service, to meet minimum standards of funding, and by requiring plan termination insurance.

UNITED STATES CODE ANNOTATED

TITLE 29. LABOR

CHAPTER 18--EMPLOYEE RETIREMENT INCOME SECURITY PROGRAM

SUBCHAPTER I--PROTECTION OF EMPLOYEE BENEFIT RIGHTS

SUBTITLE B--REGULATORY PROVISIONS

PART 5--ADMINISTRATION AND ENFORCEMENT

Current through P.L. 103-210, approved 12-20-93

§ 1132. Civil enforcement

(a) Persons empowered to bring a civil action

A civil action may be brought--

(1) by a participant or beneficiary--

(A) for the relief provided for in

subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a

participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;

(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter;

(6) by the Secretary to collect any civil penalty under subsection (c)(2) or (i) or (l) of this section;

(7) by a State to enforce compliance with a qualified medical child support order (as defined in section 1169(a)(2)(A) of this title); or

(8) by the Secretary, or by an employer or other person referred to in section 1021(f)(1) of this title, (A) to enjoin any act or practice which violates subsection (f) of section 1021 of this title, or (B) to obtain appropriate equitable relief (i) to redress such violation or (ii) to enforce such subsection.

(b) Plans qualified under Internal Revenue Code; maintenance of actions involving delinquent contributions

(1) In the case of a plan which is qualified under section 401(a), 403(a), or 405(a) of Title 26 (or with respect to which an application to so qualify has been filed and has not been finally determined) the Secretary may exercise

his authority under subsection (a)(5) of this section with respect to a violation of, or the enforcement of, parts 2 and 3 of this subtitle (relating to participation, vesting, and funding), only if--

(A) requested by the Secretary of the Treasury, or

(B) one or more participants, beneficiaries, or fiduciaries, of such plan request in writing (in such manner as the Secretary shall prescribe by regulation) that he exercise such authority on their behalf. In the case of such a request under this paragraph he may exercise such authority only if he determines that such violation affects, or such enforcement is necessary to protect, claims of participants or beneficiaries to

benefits under the plan.

(2) The Secretary shall not initiate an action to enforce section 1145 of this title.

(c) Refusal to supply requested information; failure to comply with notice requirements; penalties

(1) Any administrator (A) who fails to meet the requirements of paragraph (1) or (4) of section 1166 of this title or section 1021(e)(1) of this title with respect to a participant or beneficiary, or (B) who fails or refuses to comply with a request for any information which such administrator is required by this subchapter to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably

beyond the control of the administrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper.

(2) The Secretary may assess a civil penalty against any plan administrator of up to $1,000 a day from the date of such plan administrator's failure or refusal to file the annual report required to be filed with the Secretary under section 1021(b)(4) of this title. For purposes of this paragraph, an annual report that has

been rejected under section 1024(a)(4) of this title for failure to provide material information shall not be treated as having been filed with the Secretary.

(3) Any employer maintaining a plan who fails to meet the notice requirement of section 1021(d) of this title with respect to any participant or beneficiary or who fails to meet the requirements of section 1021(e)(2) of this title with respect to any person may in the court's discretion be liable to such participant or beneficiary or to such person in the amount of up to $100 a day from the date of such failure, and the court may in its discretion order such other relief as it deems proper.

(4) The Secretary may assess a civil penalty of not more than $1,000

for each violation by any person of section 1021(f)(1) of this title. For purposes of this paragraph, each violation described in subparagraph (A) with respect to any single participant, and each violation described in subparagraph (B) with respect to any single participant or beneficiary, shall be treated as a separate violation. The Secretary and the Secretary of Health and Human Services shall maintain such ongoing consultation as may be necessary and appropriate to coordinate enforcement under this subsection with enforcement under section 1320b-14(c)(8) of Title 42.

(d) Status of employee benefit plan as entity

(1) An employee benefit plan may sue or be sued under this subchapter as an entity. Service of summons, subpena, or other legal process of a court upon a trustee or an administrator of an employee benefit plan in his capacity as such shall constitute service upon the employee benefit plan. In a case where a plan has not designated in the summary plan description of the plan an individual as agent for the service of legal process, service upon the Secretary shall constitute such service. The Secretary, not later than 15 days after receipt of service under the preceding sentence, shall notify the administrator or any trustee of the plan of receipt of such service.

(2) Any money judgment under this subchapter against an employee benefit

plan shall be enforceable only against the plan as an entity and shall not be enforceable against any other person unless liability against such person is established in his individual capacity under this subchapter.

(e) Jurisdiction

(1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, fiduciary, or any person referred to in section 1021(f)(1) of this title. State courts of competent jurisdiction and district courts of the United States shall have

concurrent jurisdiction of actions under paragraphs (1)(B) and (7) of subsection (a) of this section.

(2) Where an action under this subchapter is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.

(f) Amount in controversy; citizenship of parties

The district courts of the United States shall have jurisdiction, without respect to the amount in controversy or the citizenship of the parties, to grant

the relief provided for in subsection (a) of this section in any action.

(g) Attorney's fees and costs; awards in actions involving delinquent contributions

(1) In any action under this subchapter (other than an action described in paragraph (2)) by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

(2) In any action under this subchapter by a fiduciary for or on behalf of a plan to enforce section 1145 of this title in which a judgment in favor of the plan is awarded, the court shall award the plan--

(A) the unpaid contributions,

(B) interest on the unpaid contributions,

(C) an amount equal to the greater of--

(i) interest on the unpaid contributions, or

(ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent (or such higher percentage as may be permitted under Federal or State law) of the amount determined by the court under subparagraph (A),

(D) reasonable attorney's fees and costs of the action, to be paid by the defendant, and

(E) such other legal or equitable relief as the court deems appropriate.

For purposes of this paragraph, interest on unpaid contributions shall be determined by using the rate provided under the plan, or, if none, the rate prescribed under section 6621 of Title 26.

(h) Service upon Secretary of Labor and Secretary of Treasury

A copy of the complaint in any action under this subchapter by a participant, beneficiary, or fiduciary (other than an action brought by one or more participants or beneficiaries under subsection (a)(1)(B) of this section which is solely for the purpose of recovering benefits due such participants under the terms of the plan) shall be served upon the Secretary

and the Secretary of the Treasury by certified mail. Either Secretary shall have the right in his discretion to intervene in any action, except that the Secretary of the Treasury may not intervene in any action under part 4 of this subtitle. If the Secretary brings an action under subsection (a) of this section on behalf of a participant or beneficiary, he shall notify the Secretary of the Treasury.

(i) Administrative assessment of civil penalty

In the case of a transaction prohibited by section 1106 of this title by a party in interest with respect to a plan to which this part applies, the Secretary may assess a civil penalty

against such party in interest. The amount of such penalty may not exceed 5 percent of the amount involved in each such transaction (as defined in section 4975(f)(4) of Title 26) for each year or part thereof during which the prohibited transaction continues, except that, if the transaction is not corrected (in such manner as the Secretary shall prescribe in regulations which shall be consistent with section 4975(f)(5) of Title 26) within 90 days after notice from the Secretary (or such longer period as the Secretary may permit), such penalty may be in an amount not more than 100 percent of the amount involved. This subsection shall not apply to a transaction with respect to a plan described in section 4975(e)(1) of Title 26.

(j) Direction and control of litigation by Attorney General

In all civil actions under this subchapter, attorneys appointed by the Secretary may represent the Secretary (except as provided in section 518(a) of Title 28), but all such litigation shall be subject to the direction and control of the Attorney General.

(k) Jurisdiction of actions against the Secretary of Labor

Suits by an administrator, fiduciary, participant, or beneficiary of an employee benefit plan to review a final order of the Secretary, to restrain the Secretary from taking any action contrary to the provisions of

this chapter, or to compel him to take action required under this subchapter, may be brought in the district court of the United States for the district where the plan has its principal office, or in the United States District Court for the District of Columbia.

(l) Civil penalties on violations by fiduciaries

(1) In the case of--

(A) any breach of fiduciary responsibility under (or other violation of) part 4 by a fiduciary, or

(B) any knowing participation in such a breach or violation by any other person,

the Secretary shall assess a civil

penalty against such fiduciary or other person in an amount equal to 20 percent of the applicable recovery amount.

(2) For purposes of paragraph (1), the term "applicable recovery amount" means any amount which is recovered from a fiduciary or other person with respect to a breach or violation described in paragraph (1)--

(A) pursuant to any settlement agreement with the Secretary, or

(B) ordered by a court to be paid by such fiduciary or other person to a plan or its participants and beneficiaries in a judicial proceeding instituted by the Secretary under subsection (a)(2) or (a)(5) of this section.

(3) The Secretary may, in the Secretary's sole discretion, waive or

reduce the penalty under paragraph (1) if the Secretary determines in writing that--

(A) the fiduciary or other person acted reasonably and in good faith, or

(B) it is reasonable to expect that the fiduciary or other person will not be able to restore all losses to the plan without severe financial hardship unless such waiver or reduction is granted.

(4) The penalty imposed on a fiduciary or other person under this subsection with respect to any transaction shall be reduced by the amount of any penalty or tax imposed on such fiduciary or other person with respect to such transaction under subsection (i) of this section and section 4975 of Title 26.

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CHAPTER 18--EMPLOYEE RETIREMENT INCOME SECURITY PROGRAM

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PART 5--ADMINISTRATION AND ENFORCEMENT

Current through P.L. 103-210, approved 12-20-93

§ 1144. Other laws

(a) Supersedure; effective date

Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of

this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

(b) Construction and application

(1) This section shall not apply with respect to any cause of action which arose, or any act or omission which occurred, before January 1, 1975.

(2)(A) Except as provided in subparagraph (B), nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities.

(B) Neither an employee benefit plan described in section 1003(a) of this title, which is not exempt under section 1003(b) of this title (other than a plan established primarily for the purpose of providing death benefits), nor any trust established under such a plan, shall be deemed to be an insurance company or other insurer, bank, trust company, or investment company or to be engaged in the business of insurance or banking for purposes of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies.

(3) Nothing in this section shall be construed to prohibit use by the Secretary of services or facilities of a State agency as permitted under section

1136 of this title.

(4) Subsection (a) of this section shall not apply to any generally applicable criminal law of a State.

(5)(A) Except as provided in subparagraph (B), subsection (a) of this section shall not apply to the Hawaii Prepaid Health Care Act (Haw.Rev.Stat. ss 393-1 through 393-51).

(B) Nothing in subparagraph (A) shall be construed to exempt from subsection (a) of this section--

(i) any State tax law relating to employee benefit plans, or

(ii) any amendment of the Hawaii Prepaid Health Care Act enacted after September 2, 1974, to the extent it provides for more than the effective administration of such Act as in effect on such date.

(C) Notwithstanding subparagraph (A), parts 1 and 4 of this subtitle, and the preceding sections of this part to the extent they govern matters which are governed by the provisions of such parts 1 and 4, shall supersede the Hawaii Prepaid Health Care Act (as in effect on or after January 14, 1983), but the Secretary may enter into cooperative arrangements under this paragraph and section 1136 of this title with officials of the State of Hawaii to assist them in effectuating the policies of provisions of such Act which are superseded by such parts 1 and 4 and the preceding sections of this part.

(6)(A) Notwithstanding any other provision of this section--

(i) in the case of an employee welfare benefit plan which is a multiple

employer welfare arrangement and is fully insured (or which is a multiple employer welfare arrangement subject to an exemption under subparagraph (B)), any law of any State which regulates insurance may apply to such arrangement to the extent that such law provides--

(I) standards, requiring the maintenance of specified levels of reserves and specified levels of contributions, which any such plan, or any trust established under such a plan, must meet in order to be considered under such law able to pay benefits in full when due, and

(II) provisions to enforce such standards, and

(ii) in the case of any other employee welfare benefit plan which is a multiple employer welfare arrangement,

in addition to this subchapter, any law of any State which regulates insurance may apply to the extent not inconsistent with the preceding sections of this subchapter.

(B) The Secretary may, under regulations which may be prescribed by the Secretary, exempt from subparagraph (A)(ii), individually or by class, multiple employer welfare arrangements which are not fully insured. Any such exemption may be granted with respect to any arrangement or class of arrangements only if such arrangement or each arrangement which is a member of such class meets the requirements of section 1002(1) and section 1003 of this title necessary to be considered an employee welfare benefit plan to which this subchapter applies.

(C) Nothing in subparagraph (A) shall affect the manner or extent to which the provisions of this subchapter apply to an employee welfare benefit plan which is not a multiple employer welfare arrangement and which is a plan, fund, or program participating in, subscribing to, or otherwise using a multiple employer welfare arrangement to fund or administer benefits to such plan's participants and beneficiaries.

(D) For purposes of this paragraph, a multiple employer welfare arrangement shall be considered fully insured only if the terms of the arrangement provide for benefits the amount of all of which the Secretary determines are guaranteed under a contract, or policy of insurance, issued by an insurance company, insurance service, or insurance

organization, qualified to conduct business in a State, qualified medical child support orders (within the meaning of section 1169(a)(2)(A) of this title), and the provisions of law referred to in section 1169(a)(2)(B)(ii) of this title to the extent enforced by qualified medical child support orders.

(7) Subsection (a) shall not apply to qualified domestic relations orders (within the meaning of section 1056(d)(3)(B)(i) of this title).

(8) Subsection (a) of this section shall not be construed to preclude any State cause of action--

(A) with respect to which the State exercises its acquired rights under section 1169(b)(3) of this title with respect to a group health plan (as defined in section 1167(1) of this

title), or

(B) for recoupment of payment with respect to items or services pursuant to a State plan for medical assistance approved under title XIX of the Social Security Act [42 U.S.C.A. § 1396 et seq.] which would not have been payable if such acquired rights had been executed before payment with respect to such items or services by the group health plan.

(c) Definitions

For purposes of this section:

(1) The term "State law" includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State. A law of the United States applicable only to the

District of Columbia shall be treated as a State law rather than a law of the United States.

(2) The term "State" includes a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this subchapter.

(d) Alteration, amendment, modification, invalidation, impairment, or supersedure of any law of United States prohibited

Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States (except as provided

in sections 1031 and 1137(b) of this title) or any rule or regulation issued under any such law.

SUPREME COURT, U.S.
FILED
APR 1 1994
OFFICE OF THE CLERK

No. 93-1390

In The

Supreme Court of the United States

October Term, 1993

JANELLE SUSAN SPAIN, an individual, and JENNA MARGARET SPAIN, a minor, by and through her Guardian Ad Litem, JANELLE SPAIN,

Petitioners,

v.

AETNA LIFE INSURANCE COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether section 514(a) of the Employee Retirement and Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1144(a), preempts a common law action for an allegedly wrongful delay in authorizing a medical procedure under an employee benefit plan.

PARTIES TO THE PROCEEDING BELOW

Respondent Aetna Life Insurance Company was the Defendant-Appellee in the Court of Appeals.[1]

Janelle Susan Spain, an individual, and Jenna Margaret Spain, a minor, by and through her Guardian Ad Litem, Janelle Spain, were the Plaintiffs-Appellants in the Court of Appeals.

---

[1] Pursuant to Rule 29.1, respondent Aetna Life Insurance Company provides the following list of parent corporations and non-wholly owned subsidiaries: Aetna Life and Casualty Company, Med Southwest, Inc., HEALTHWAYS, Inc., Aetna Health Plans of San Diego, Inc., PHPSNE Parent Corporation, Aetna Health Plans of Florida, Inc., and PARTNERS Health Plan of Pennsylvania, Inc.

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29 U.S.C. § 1144(a) .....i, 1, 3

STATEMENT OF THE CASE

This is a wrongful death action brought by petitioners Janelle and Jenna Spain (the "Spains") against respondent Aetna Life Insurance Company ("Aetna") for Aetna's allegedly wrongful delay in approving payment of plan benefits for a medical procedure in its capacity as the third-party "claims administrator" of an employee benefit plan established by Trans World Airlines ("TWA").[2] The United States District Court for the Central District of California dismissed the action on the ground that it was preempted by section 514(a) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1144(a). The court noted:

> [T]he main thrust of the lawsuit is that a denial in authorizing a continuation of medical treatment in progress negligently caused the death of an ERISA beneficiary. This has to do directly with the administration of an ERISA plan, and is therefore "related" to the plan within the meaning of *Pilot Life [Insurance Co. v. Dedeaux*, 481 U.S. 41 (1987)] preemption.

Pet. App. B-14 to B-15.

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[2] Although the Spains claim that the brief delay in the authorization of plan benefits caused the death of Steven Spain, Janelle Spain's husband and Jenna Spain's father, Steven Spain died as the result of testicular germ cell cancer. In declarations filed in the district court, Mr. Spain's doctors acknowledged that, even assuming there had been no delay in conducting the medical procedure, Mr. Spain's cancer, which was belatedly diagnosed at an advanced stage, would very likely have taken his life.

The Ninth Circuit affirmed. The court noted that section 514(a), which provides that ERISA "supersede[s] any and all state laws insofar as they may now or hereafter relate to any employee benefit plan," "is 'deliberately expansive,' " Pet. App. A-6, quoting *Pilot Life*, 481 U.S. at 45-46, and that this Court "has instructed that 'relates to' is to be 'given its broad common-sense meaning.' " Pet. App. A-7, quoting *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 739 (1985). This means, the court held, that " 'state common law causes of action arising from the improper processing of a claim are preempted by federal law.' " Pet. App. A-8, quoting *Kanne v. Connecticut General Life Ins. Co.*, 867 F.2d 489, 493 (9th Cir. 1988), *cert. denied*, 492 U.S. 906 (1989). This conclusion, the court further observed, was consistent with the decisions of the other federal courts of appeals that have considered the issue. Pet. App. A-8 to A-9.[3]

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[3] At its essence, the Spains' wrongful death lawsuit seeks to relitigate the very same employee benefit determinations which were at issue in an ERISA action brought in June of 1990 by Steven Spain, the decedent. In that lawsuit, the decedent also asserted causes of action for breach of contract, estoppel, breach of fiduciary duty, bad faith and fraud. The district court in that case specifically held that Steven Spain's lawsuit was one for the recovery of plan benefits under ERISA, and that his claims for extra-contractual damages were preempted by ERISA's statutory framework.

REASONS FOR DENYING THE WRIT

The decision below is correct. There is no conflict among the circuits (indeed, none even is alleged), nor is there any reason for granting review. In this routine ERISA case, the courts below simply followed this Court's decisions in *Pilot Life*, *Metropolitan Life*, and other similar ERISA preemption cases.

I.

THE DECISION OF THE NINTH CIRCUIT IS CONSISTENT WITH THE ERISA PREEMPTION DECISIONS OF THIS COURT AND WITH THE DECISIONS OF THE OTHER COURTS OF APPEALS THAT HAVE CONSIDERED ERISA'S PREEMPTION OF WRONGFUL DEATH CLAIMS

A. ERISA'S Comprehensive Statutory Scheme Preempts State Wrongful Death Claims.

Pilot Life controls this case. As this Court noted, ERISA is a statutory scheme that comprehensively regulates employee benefit plans that provide medical, surgical, or hospital care or benefits in the event of sickness, accident, disability or death. *Pilot Life*, 481 U.S. at 44. Consistent with its decision to create a comprehensive, uniform federal scheme for the regulation of employee benefit plans, Congress drafted ERISA's preemption clause in broad terms. *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 139 (1990). *See also FMC Corp. v. Holliday*, 498 U.S. 52, 58 (1990).

ERISA provides that its provisions "shall supersede any and all state laws insofar as they . . . relate to any employee benefit plan. . . . " 29 U.S.C. § 1144(a). The key

to determining whether a state law is subject to ERISA preemption is whether the state law "relates to" an ERISA plan, and this Court has instructed that "relates to" is to be "given its broad common-sense meaning." *Metropolitan Life*, 471 U.S. at 739.

A state law "relates to" a benefit plan if it has a "connection with or reference to such a plan." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 95 (1983). A state law also "relates to" a benefit plan if operation of the law impinges on the functioning of the plan. *Metropolitan Life*, 471 U.S. at 739.[4]

A state law (whether statute or common law) that permits recovery for alleged improper processing of a claim under an employee benefit plan obviously "relates to" the benefit plan. Such a law requires both construction of the terms of the benefit plan and evaluation of the actions taken in administering the plan. Congress specifically barred such state interference in matters so central to the functioning of the plan.

The Spains argue that the effect of state wrongful death actions on ERISA plans is "too tenuous, remote or peripheral" to justify preemption because (1) the parties to the action are not ERISA principals, Pet. 25, and (2) the damages sought would not be assessed against the plan. Pet. 17. These contentions are factually incorrect. Janelle Spain, the decedent's wife, in fact is an ERISA principal –

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[4] Moreover, a state law or claim may "relate to" a benefit plan, and thereby be subject to ERISA preemption, "even if the law is not specifically designed to affect such plans, or the effect is only indirect." *Ingersoll-Rand*, 498 U.S. at 139.

she is the TWA employee and plan participant by virtue of which the decedent became a plan beneficiary. And damages against claim administrators, ultimately, are borne by the plan, in one way or another. As this Court observed in *Mertens v. Hewitt Associates*, 113 S.Ct. 2063, 2072 (1993), exposure to this sort of liability "would impose high insurance costs upon persons who regularly deal with and offer advice to ERISA plans, and hence upon ERISA plans themselves."

The Spains ignore the fact that their tort action is based solely upon Aetna's alleged negligent delay in authorizing payment for medical benefits under the TWA plan – *i.e.*, the alleged failure to adequately perform duties created by an ERISA plan. Because the tort claim is inextricably intertwined with benefit determinations made by Aetna in connection with the TWA plan, the claim "relates to" an ERISA plan within the meaning of *Pilot Life* and its progeny and plainly is preempted by section 514(a) of ERISA.[5]

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[5] The Spains' reliance upon *Mackey v. Lanier Collection Agency & Service, Inc.*, 486 U.S. 825 (1988), is also misplaced. In *Mackey*, this Court reviewed ERISA's provisions dealing with the execution of civil judgments and the alienation, assignment and garnishment of benefits and held that ERISA did not preempt a state's general garnishment statute as applied to collect judgments against plan participants. In *Mackey*, this Court relied, in part, on specific changes to ERISA effected through the Retirement Equity Act of 1984, which were thought necessary to insure that the statute's preemption provision could not be used to block the enforcement of domestic support orders. *Id.* at 838. Thus, both the facts and statutory context of *Mackey* were quite different from this case.

B. The Decision Of The Ninth Circuit Is Consistent With The Courts Of Appeals That Have Addressed ERISA Preemption Of Wrongful Death Claims.

The decision below is in accord with the decisions of the Fifth, Eighth and Tenth Circuits, the only other appellate courts that have specifically addressed ERISA preemption of wrongful death claims. *See Corcoran v. United Healthcare, Inc.*, 965 F.2d 1321, 1329-1330 (5th Cir. 1992), *cert. denied*, 113 S.Ct. 812 (1992); *Kuhl v. Lincoln National Health Plan of Kansas City, Inc.*, 999 F.2d 298, 304 (8th Cir. 1993), *cert. denied*, 114 S.Ct. 694 (1994); *Settles v. Golden Rule Ins. Co.*, 927 F.2d 505, 508-509 (10th Cir. 1991).

The reasoning in *Settles* is representative of all three cases. In *Settles*, the Tenth Circuit found the injury alleged to be the direct result of the termination of plan benefits and therefore held the claims to be preempted by ERISA:

> The factual basis for each of plaintiff's state law claims directly concerns the alleged improper administration of the benefit plan. *Although [plaintiff] is not seeking benefits under the insurance policy, her claims require a finding that defendant wrongfully terminated [the] insurance coverage. Therefore, the claims relate to the employee benefit plan.*
>
> *Had Mr. Settles survived the wrongful termination of his benefits, any claim that he could have brought based on the wrongful termination of his benefits would have been barred by ERISA because it would have related to his employee benefit plan.* Therefore, because the decedent could not have brought suit under these facts, plaintiff's wrongful death claim is similarly barred.

927 F.2d at 509-510 (emphasis supplied). *See also Corcoran*, 965 F.2d at 1331-1332 (principle of *Pilot Life* that ERISA preempts state law claims alleging improper handling of benefit claims is broad enough to cover wrongful death actions); *Kuhl*, 999 F.2d at 302 (decision not to precertify payment deemed to relate directly to the administration of plan benefits).

Similarly here, even though the Spains are not themselves seeking plan benefits, their claim for tort damages in addition to the plan benefits that were paid, requires a finding that the plan benefits were improperly delayed, thus giving the claim a necessary and obvious connection with an ERISA plan for preemption purposes.[6]

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[6] Importantly, the two cases upon which the Spains primarily rely, *Memorial Hospital System v. Northbrook Life Ins. Co.*, 904 F.2d 236, 250 (5th Cir. 1990), and *Sommers Drug Stores Co. v. Corrigan Enterprises, Inc.*, 793 F.2d 1456 (5th Cir. 1986), were decided by the same court that in 1992 determined that wrongful death claims are preempted by ERISA. The decision in *Corcoran* makes abundantly clear that the Fifth Circuit would preempt the wrongful death claim here.

II.

ERISA PREEMPTION IS NOT DEPENDENT UPON AN ERISA REMEDY AND ANY "GAP IN REMEDIES" SHOULD BE ADDRESSED TO CONGRESS

The Spains contend that preemption is not appropriate here because they will be left without any remedy.[7] However, preemption is not dependent upon the availability of ERISA remedies. *Pilot Life*, 481 U.S. at 54; *Lister v. Stark*, 890 F.2d 941, 946 (7th Cir. 1989), *cert. denied*, 111 S.Ct. 579 (1990) ("[T]he availability of a federal remedy is not a prerequisite for federal preemption"). Even if it were, the choice of remedies is a matter for Congress, not this Court.

In *Phillips v. Amoco Oil Co.*, 799 F.2d 1464, 1470 (11th Cir. 1986), *cert. denied*, 481 U.S. 1016 (1987), the Eleventh Circuit explained why Congress' creation of a "gap" in the law does not "undermine the reasoning on which a finding of preemption is based":

> The employees protest that to hold that ERISA preempts this fraud claim, while also holding that ERISA does not prohibit the wrong the employees feel they have suffered, leaves a "gap" in the law. That is exactly the result that obtains when Congress determines that federal law should govern a broad area to the exclusion of state regulation and chooses not to prohibit

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[7] Although the Spains assert the absence of any remedy for what they allege transpired, their claim is more appropriately addressed to the UCLA Medical Center which abandoned Mr. Spain in the middle of the medical procedure. UCLA surely could have continued treating Mr. Spain while the parties resolved the certification issue.

> the actions formerly prohibited by state law. It is the very conflict between the federal scheme and state law that is to be avoided through preemption.

See also Olson v. General Dynamics Corp., 960 F.2d 1418, 1423 (9th Cir. 1991) ("We agree with the Eleventh Circuit that any such gap is the concern of Congress"); *Kuhl*, 999 F.2d at 304 (modification of ERISA in light of modern insurance practices "must be the job of Congress, not the courts").

CONCLUSION

The petition for writ of certiorari should be denied.

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Respectfully submitted,

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